IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, TRUSTEES OF THE BERNICE P. BISHOP ESTATE; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY TO STATEMENT

The Statement of the Government with respect to Kuapa Pond's history conveys a simplistic and misleading impression of the facts. Correction is essential to enable the Court to resolve this case in accurate perspective.

While Kuapa Pond was used for centuries for raising mullet, its owners do not, as the Government implies, possess only a license to raise fish. Beginning in 1848,

the Great Mahele granted private titles to fish ponds "to the same extent and in the same manner as rights were recognized in fast land" (Pet. App. 17a). The Trustees hold undisputed title to Kuapa Pond dating from the Hawaiian Monarchy, and have consistently maintained it as private property, excluding the general public (App. 29-30). No public navigation servitude was ever exercised over its waters (Pet. App. 28a).

The Government also omits mention of the pond's material physical characteristics. In its natural condition, it was a shallow inland water body used only by flat bottom boats and was isolated by a prehistoric barrier beach which prevented boat traffic to the open sea (Pet. App. 15a; Tr. 9-10; App. 30-31).[1] It has always been a distinct, independent water body.

The Government's Statement with respect to Kuapa Pond after Petitioners' improvements is even more misleading. Kuapa Pond is not a burgeoning commercial harbor. It was improved for recreational use in conjunction with a marina-style residential community (App. 31). The primary activities in the pond today are sailing, boating, swimming and fishing (App. 62, 39-40). Although the interior of the pond was dredged and filled, the seaward boundary has remained intact and no reshaping of navigable waters has resulted (*See* Attachment B to Defendants' Exhibit 36). This improvement was accomplished with and is presently maintained by private funds (App. 25-26; Defendants' Exhibit 31).

The depth of the pond, together with restricted clearance under the highway bridge over the entrance channel,

[1] All transcript ("Tr.") references are to the transcript of trial proceedings commencing on November 19, 1975.

negate any reasonable possibility of significant commercial use. The Marina Queen operation, upon which the Government places great emphasis, was terminated in early 1974. While in use, it traveled solely within the waters of the pond. It cannot realistically be viewed as a commercial passenger craft. (App. 22; Pet. App. 18a-19a, 28a-29a). The limited berthing privileges extended to certain nonresidents, upon payment of fees, were solely for recreational vessels.[2] Petitioners have never exercised their right to license commercial vessels (App. 21-22; Defendants' Exhibit 13, ¶ 5(c)).[3]

The Government also incorrectly asserts that it consistently maintained that Kuapa Pond became public navigable waters once a channel was dredged to adjacent Maunalua Bay. In fact, dredging began shortly after April 27, 1961 (App. 31). By the time the Corps of Engineers issued its report on Hawaiian Coastal waters in 1964, a channel had been completed and the report listed the pond as a *private* small craft marina (Defendants' Exhibit 16). In 1966, the channel was enlarged and improved. Because a permit for work in adjacent Maunalua Bay was necessary, the Corps was consulted and approved the plans, which reflected a 6.2 foot deep pre-existing channel (App. 48, 66-67, 56-60). Not until 1971, when Kaiser Aetna began plans to construct a fueling facility, did the Corps even suggest that Kuapa Pond was navigable (App.

[2] The evidence as to the nonresident boats is Court Exhibit 1 (App. 64-65). It provides no foundation for the broad conclusion that Petitioners transformed Kuapa Pond into a combination harbor and canal.

[3] The scuba diving operation to which the Government refers was terminated by Kaiser Aetna "immediately" after it learned about it (App. 23). No plans for a boat rental concession were ever implemented (*Id.*).

43, 40). Not until January 11, 1972, did the Corps formally take the position that Kuapa Pond was navigable (and then it demanded only that permits for work in the pond be obtained—it did not mention public access) (App. 44). Not until October 12, 1972, over ten years after improvements were begun, did the Corps officially determine Kuapa Pond to be a navigable water of the United States (App. 35).[4] In fact, the Corps did not consider Kuapa Pond to be navigable until after revision of its regulatory policies in response to environmental pressures of the early 1970's.[5] The Government cannot now contend that it has always considered Kuapa Pond to be public.

SUMMARY OF REPLY ARGUMENT

Kuapa Pond in its original condition was a Hawaiian fish pond which, under unique Hawaiian property concepts, is "the legal equivalent of fast land for property and 'navigation' purposes" (Pet. App. 28a). No public servitude or right of access has ever been recognized or exercised over its waters.

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[4] The Coast Guard on February 27, 1973 issued its own determination of navigability (App. 47-51).

[5] The Corps' recent change of policy is documented by the radical revision of its regulations in 1972 (37 Fed. Reg. 18290-91 (1972), *codified* as 33 C.F.R. § 209.260, now § 329.8), from the traditional navigability-in-fact test of *The Daniel Ball*, 77 U.S. 10 (Wall.) 557, 563 (1871), as embellished by the reasonable improvement standard of *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-08 (1940), to a much more encompassing standard extending jurisdiction beyond navigability-in-fact to nonnavigable tidal waters and certain private waters, among others. *Compare* Defendants' Exhibits 20, 21 and 22 *with* Defendants' Exhibits 23 and 24. This expanded assertion of regulatory power, to which the Corps alluded for the first time in its January 11, 1972 letter to Kaiser Aetna (App. 38), has been already documented (Br. for Pet., 28-43). The Government itself now specifically concedes that regulatory jurisdiction is not determinative of the public access question (Br. for U.S., 23 n.18).

The existence of unique private property rights is not subject to controversy. The Government's characterization of the property rights in fish ponds as no more than a license to take fish is untenable. Kings, courts and legislatures have always distinguished between rights in sea fisheries, by nature a license to take fish, and rights in fish ponds, by nature as absolute as title to fast land. While a sea fishery could coexist with public navigation, a fish pond is within the complete dominion and control of its owner, free from public navigation and incapable of forfeiture other than in ways common to all forms of real property. The unique private property rights in a fish pond therefore continue, even if the pond is no longer used to raise fish and even if it is open to the sea. *In re Application of Kamakana*, 58 Haw. 632, 574 P.2d 1346 (1978); Haw. Op. Att'y Gen. 57-159 (Dec. 12, 1957) (Defendants' Exhibit 9); Pet. App. 31a-33a.

The Government's repeated protests that state law cannot define the limits of the federal navigation servitude misstate the case. In both the Act of Annexation and in Section 95 of the Organic Act, the unique Hawaiian rights in fish ponds were *federally* recognized as vested pre-Annexation rights the United States was bound to respect under both domestic and international law. *See Knight v. United States Land Association*, 142 U.S. 161, 182-85 (1891); *San Francisco v. Le Roy*, 138 U.S. 656, 670-72 (1891). One must resort to Hawaiian law to ascertain the extent of the vested right, but once a preexisting vested right has been established, it is protected by federal as well as state law. *Damon v. Territory of Hawaii*, 194 U.S. 154, 158 (1904); *Carter v. Territory of Hawaii*, 200 U.S. 255, 256-57 (1906).

Even under general federal navigation law, Kuapa Pond is a private body of water not subject to any public

navigation servitude. This Court has consistently distinguished between public navigable waters, which the national interest demands be preserved for free public use, and private fast lands and nonnavigable waters, which remain within the proprietary dominion of their private owners. *E.g., United States v. Cress,* 243 U.S. 316, 320-21 (1917); *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799, 804-08 (1950).

The Government now accepts this settled distinction. It no longer maintains that all waters subject to regulation are *ipso facto* public (Br. for U.S., 23 n.18). It does argue, however, that Kuapa Pond was public navigable waters even in its natural condition or, in the alternative, that it was "dedicated" to public use when Petitioners dredged a channel connecting it with adjacent navigable waters. Neither contention withstands examination.

In its natural condition, Kuapa Pond was a shallow inland water body nonnavigable under the controlling "navigability-in-fact" test of *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871), as this Court's own opinions establish. *Leovy v. United States,* 177 U.S. 621 (1900); *Egan v. Hart,* 165 U.S. 188 (1897). It was likewise nonnavigable under *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-08 (1940), for no evidence exists of any reasonable commercial need for its improvement, and the fact that Petitioners did improve it is no proof thereof (Pet. App. 23a-24a).

The fact that Petitioners at their own expense improved Kuapa Pond to support recreational navigation is irrelevant. The philosophy underlying the servitude's principles of public access and noncompensability is that public waters have "always" been subject to the servitude. *E.g., United States v. Rands,* 389 U.S. 121, 123 (1967).

Waters public in their natural condition remain public, whether or not improved. Private waters are a different matter. If publicly improved, they may become public, but if privately improved, the lack of any preexisting public right or interest prohibits public use without payment of just compensation. *United States v. Cress,* 243 U.S. 316, 321 (1917); 36 Op. U.S. Att'y Gen. 203, 213-15 (1930). Any other rule would transform a principle designed to preserve public waters into a device to expropriate private waters, "an abuse" of federal law wholly beyond its object and needs. *Veazie v. Moor,* 55 U.S. (14 How.) 568, 575 (1852).

The Government itself implicitly recognizes the correctness of this position, and realizing that no public rights existed in Kuapa Pond, attempts to convince the Court that Petitioners "dedicated" the pond to public use by connecting it with navigable waters. No basis exists for this position. There is no evidence or suggestion in the record that Petitioners "dedicated" their private property to public use. On the contrary, Petitioners have consistently excluded the public, and mere connection of Kuapa Pond to Maunalua Bay is no more a dedication of the pond than is a private land owner's connection of his garage to a public street.

No justification exists for uncompensated imposition of a servitude upon Kuapa Pond. No navigation servitude ever applied to it. No public project is involved. No public funds have been expended. No threat to public interests is presented that cannot be dealt with by regulation alone. Nor will any general public interest be served, for the most likely consequence is that private owners of small water bodies will simply forebear from future improvements and suffer present ones to deteriorate.

The inescapable result of affirmance of the Ninth Circuit's imposition of a navigation servitude upon Kuapa Pond will be appropriation of private rights, without payment of compensation, for public recreational use. An uncompensated confiscation of private fast lands for recreational purposes would never be tolerated by this Court. No different principle should apply to private waters. If the navigation servitude as defined by this Court's extant decisions should be deemed to require so unprincipled a consequence, the servitude should be limited and redefined.

REPLY TO ARGUMENT

I.

Kuapa Pond Is Private Real Property Not Subject to a Public Right of Navigation

A. Kuapa Pond, By Virtue of Vested Rights Under Pre-Annexation Hawaiian Law, is Private Real Property, the Legal Equivalent of Fast Land, and Not a Mere License to Take Fish.

The Government would have this Court believe that fish ponds were always open to the public, subject only to the owners' exclusive license to take fish and, *ipso facto,* when the fishing ceases, the public right alone remains. This proposition is false. It is founded upon a confusion of fish ponds with sea fisheries which distorts and renders meaningless the Government's entire argument as to the legal status of fish ponds.

Petitioners have cited numerous authorities and usages of Hawaiian jurisprudence which establish that fish ponds are the legal equivalent of fast land (Br. for Pet., 15-28). The Government does not contradict these authorities. Rather it admits the force of them and attempts to gain-

say them either as proof only of a private fishing right or as not binding upon the United States. The Government is wrong on both counts.

A fish pond may be any one of several types of enclosed ponds used to cultivate fish.[6] Within these fish ponds, the Hawaiians literally grew fish. They seeded them with mullet spawn, maintained the bottom, walls and water, attended to the operation of the *makaha,* or sluice grates, which prevented the fish from escaping, and harvested mature fish (Pet. App. 16a; Tr. 70-72). Fish ponds were not designed to support any sort of navigation other than that incidental to their operation and maintenance. Kuapa Pond was only about two feet deep and large areas were exposed at low tide. Harvesting was done in shallow draft boats (App. 30). Even today, after dredging, the average depth is only six feet (App. 21).

Thus, a fish pond is analogous to a dry land farm. To characterize this enterprise as nothing more than the right to take fish overlooks the very nature of the fish pond and is as misleading as calling a Kansas wheat farm the right to take wheat.

Hawaiian fisheries, on the other hand, are merely vast tracts of open ocean in which a particular chief had the right to taboo the taking of a particular fish, or to demand a percentage of the catch. Neither the fish nor the fishery are enclosed or otherwise restricted. *See Damon v. Territory of Hawaii,* 194 U.S. 154, 158-61 (1904). Fish-

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[6] Examples include the *loko ia kalo,* which were fresh water ponds used to grow both fish and taro, and the *loko pu'u one,* which were filled with brackish water and cut off from the sea by a barrier beach (Tr. 65-67). Kuapa Pond derives its name from yet another variety, the *loko kuapa,* in which the barrier beach was reinforced by a stonewall in ancient times (Tr. 66-67, 69, 78).

eries are open to navigation and are merely rights appurtenant to the ownership of an *ahupua'a* or *ili*.[7]

Fish ponds, however, are the legal equivalent of fast land, no different from taro patches, house lots and gardens, *Harris v. Carter*, 6 Haw. 195, 197 (1877); *Kapea v. Moehonua*, 6 Haw. 49, 53-55 (1871), and form an integral part of the *ahupua'a* or *ili* in which they are located (Tr. 83, 87).[8]

These ancient distinctions were perpetuated by the Great Mahele of 1848, wherein Kamehameha III introduced Anglo-American concepts of land tenure while preserving intact the ancient forms of property. Consequently, the Land Commission, a body empowered only to settle claims to "landed property,"[9] included Kuapa Pond

[7] Report of the Committee on Fisheries, Sept. 7, 1898, appended to the Report of the Hawaiian Commission, S. Doc. No. 16, 55th Cong. 3rd Sess., Dec. 6, 1898.

[8] The Government misconstrues *Murphy v. Hitchcock*, 22 Haw. 665, 668 (1915). Contrary to the Government's assertion that *Murphy* holds a fish pond private only so long as it remains enclosed, *Murphy* actually further illustrates the rule that fish ponds are private real property. The suit arose when the purchaser of a fish pond lease at a sheriff's sale claimed title to the fish in the pond as well. The court said that the fish pond leasehold was analogous to a leasehold of a mercantile house and held that the lease did not include the stock. The court referred to fish in enclosed ponds to distinguish them from animals *ferae naturae* and concluded that although the fish in question were subject to private ownership, title to them did not pass with title to the pond. The Government's vain attempt to find support for its views in *Murphy* is based entirely on words taken out of context.

[9] The work of the Land Commission and its powers have been discussed in Petitioner's initial Brief (Br. of Pet., 18-19). The enabling legislation clearly restricted the Land Commission to "landed property" (Laws of 1854, p. 21; Civil Code p. 415) and in practice the Commission consistently refused to determine title to sea fisheries. *Carter v. Territory of Hawaii*, 200 U.S. 255, 257 (1906); *State v. Hawaiian Dredging Co.*, 48 Haw. 152, 174, 397 P.2d 593, 606 (1964).

within its award to Princess Kamamalu, Petitioners' predecessor in title (Defendants' Exhibit 3). Later, when the Boundary Commission, which had no authority to settle the boundaries of sea fisheries,[10] determined the boundaries of Maunalua, it too adhered to ancient custom and placed the seaward boundary of the Ili along the reinforced barrier beach (Defendants' Exhibit 4), which even today defines the boundary between Kuapa Pond and the sea fishery of Maunalua (App. 29).

The District Court understood the inherent difference between fish ponds and sea fisheries and recognized that Hawaiian law has always protected private ownership of fish ponds (Pet. App. 25a-28a).

The District Court's recognition of the force of Hawaiian custom and usage is in accord with the holding of this Court in *Carino v. Insular Government of the Philippine Islands*, 212 U.S. 449 (1909). In that case, brought after the United States acquired the Philippines from Spain, the government opposed a Filipino's application to register title to land his family had long occupied according to Philippine Island's customs. The government wanted the land for public and military purposes and argued that Carino had no documentary proof of title. This Court ruled in favor of Carino, remarking that native custom and long association, "one of the profoundest factors in human thought" regarded the property as private, not public. *Id.* at 459. This Court concluded

[10] Like the Land Commission, the Boundary Commission had no jurisdiction as to the sea fisheries, *Bishop v. Mahiko*, 35 Haw. 608, 658 (1940), but routinely included fishponds within approved boundaries, *In re Application of Kamakana*, 58 Haw. 632, 638-41, 574 P.2d 1346, 1349-51 (1978). The Boundary Commission is also discussed in Petitioners' initial Brief (Br. of Pet., 19-20).

that Carino ". . . should not be deprived of what, by the practice and belief of those among whom he lived, was his property. . . ." *Id.* at 463.

Fish ponds' status as the legal equivalent of fast land was a settled principle of Hawaiian law well-known to the framers of the Hawaiian Organic Act. The Hawaiian Commission, appointed by Congress to recommend legislation concerning Hawaii, prepared a special report on Hawaii's sea fisheries which opened with a narrative wherein fish ponds and fisheries are distinguished both legally and factually.[11] Congress specifically adopted the Commission's distinction in Section 95 of the Organic Act (48 U.S.C. § 506) by repealing exclusive fishing rights in Hawaiian waters, but, in accordance with long-established Hawaiian law, specifically exempting Hawaiian fish ponds.[12]

Moreover, in Section 96 of the Organic Act (48 U.S.C. § 507), Congress allowed owners to register their fisheries but empowered the Territory of Hawaii to condemn them upon compensation to their owners for the taking. Congress thereby recognized that vested rights, however foreign to American concepts, are deserving of legal protection.

The Government's mistaken characterization of fish ponds as merely the right to take fish overlooks the entire legal history of the subject and would have the ironic effect of denying to fish pond owners the same guarantee against public taking without just compensation afforded fishery owners by Congress in Section 96 of the Organic Act and assured by this Court in *Damon v. Territory of Hawaii,* 194 U.S. 154, 158 (1904), and *Carter v. Territory of Hawaii,* 200 U.S. 255, 256-57 (1906).

[11] Report of the Committee on Fisheries, note 7, *supra.*

[12] The Government incorrectly asserts (Br. for U.S., 27 n.23) that Section 95 is no longer federal law, citing Section 15 of the Admission Act, Pub. L. No. 86-3, 73 Stat. 11, which repeals "Territorial laws." Such laws are defined as ". . . all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Hawaii prior to its admission into the Union, ..." Section 95, however, was no mere governmental measure, but rather an essential recognition of pre-Annexation vested rights. It remains in effect and is still codified as 48 U.S.C. § 506.

The Government's position that fish pond owners have title only to the bottom is equally spurious. It is self-evident that water is an essential component of a fish pond. To declare it public is inconsistent with historical usage and the very essence of the property right.

The Government also disparages post-Annexation Hawaii authorities as state law not binding on the federal government. On the contrary, to the extent that the Hawaii court has elucidated pre-Annexation Hawaiian property law, its decisions are conclusive even as to the federal government. *See Knight v. United States Land Association,* 142 U.S. 161, 182-85 (1891); *San Francisco v. Le Roy,* 138 U.S. 656, 670-72 (1891). The inquiry should be directed to whether the claimed property right antedates Annexation, not to the date of the Hawaii court's decision describing the right.

The Government's contention that a fish pond remains private only so long as it is used to raise fish is only a restatement of its mistaken view that fish ponds are the same as fisheries. As the Hawaii Supreme Court's recent decision in *In re Application of Kamakana,* 58 Haw. 632, 574 P.2d 1346 (1978) demonstrates, a fish pond, like any other farm, remains private real property regardless of whether or not it is currently used to raise fish.

In *Kamakana* the Hawaii Supreme Court affirmed Land Court (Torrens System) title to Kanoa Pond, although

that fish pond is dilapidated and has not been used to raise fish since as early as 1854. Kanoa Pond, like Kuapa Pond, is a *loko kuapa*, but the court saw no detriment to its owner's rights in the fact that the fish pond's wall was partially destroyed.

Former Hawaii Attorney General Herbert Y. C. Choy reached the same conclusion. In his opinion, a fish pond remains private property until title is lost by some legal means such as adverse possession. No public right exists except to trespass in times of emergency. Haw. Op. Att'y Gen. 57-159, Dec. 12, 1957 (Defendants' Exhibit 9). Even the Government concedes that the trespass point need not have been made if the waters are public anyway (Br. for U.S., 30-31 n.25).

In summary, Hawaii's courts, attorneys general, land commission, boundary commission and all others concerned with property title have never doubted that fish ponds, including the water within them, are a unique form of real property and the legal equivalent of fast land. Congress adopted this view in the Organic Act and the Government has not refuted it.

The District Judge, who is experienced and highly familiar with local law and local conditions, knew and understood this unusual fact of Hawaiian real property law and accorded it the legal protection it deserves (Pet. App. 25a-28a, 31a-33a). His opinion should not be lightly disregarded. *See* C. WRIGHT, LAW OF FEDERAL COURTS, § 58 at 271 (3d ed. 1976).

Given the status of fish ponds as the equivalent of fast land, the Court of Appeals and the Government have both erred. It is no more relevant whether fish are being harvested in a fish pond than it is whether corn is being

grown on an Iowa farm. They both remain private property unless and until they are lawfully acquired by the public and their owners fairly compensated.

B. Under Federal Navigation Law, Kuapa Pond Is Private, Nonnavigable In Law, And Unburdened By A Navigation Servitude.

1. Kuapa Pond was Private And Nonnavigable In Its Natural Condition.

Kuapa Pond was a distinct and independent inland water body, separated for centuries from the open sea by a permanent barrier beach formation. It was so shallow that it could be used only by flat bottom boats and no water traffic ever traveled from it to the open sea (App. 29-31; Pet. App. 16a). It was never used, nor susceptible to use, as a highway of water commerce.[13] Not even the Government so contends. The Government does contend that Kuapa Pond was navigable in its natural condition, because it was subject to tidal action, and because it was capable of improvement for use by interstate commerce. Neither point has merit.

This Court discarded the "ebb and flow" test over one hundred years ago in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). Thereafter, courts consistently applied navigability-in-fact as a uniform national standard.[14] The

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[13] Even if raising mullet could be considered water "commerce," it was not the required "interstate commerce." *E.g., Hardy Salt Co. v. Southern Pacific Transportation Co.*, 501 F. 2d 1156, 1165-69 (10th Cir.), *cert. denied*, 419 U.S. 1033 (1974); *Minnehaha Creek Watershed District v. Hoffman*, 449 F. Supp. 876, 883-84 (D. Minn. 1978), *aff'd on point*, 597 F.2d 617, 621-24 (8th Cir. 1979).

[14] *E.g., Leovy v. United States*, 177 U.S. 621 (1900); *United States v. American Cyanamid Co.*, 354 F. Supp. 1202, 1204 (S.D.N.Y. 1973), *aff'd on other grounds*, 480 F.2d 1132 (2d Cir. 1973); *Pitship Duck Club v. Sequim*, 315 F. Supp. 309, 310-11 (W.D. Wash. 1970); *North American Dredging Co. of Nevada v.*

Corps of Engineers itself never relied upon ebb and flow until the early 1970's and then only for regulatory purposes.[15] In any event, the ebb and flow test has no application to an independent water body such as Kuapa Pond.[16]

The Government fares no better with its argument that Kuapa Pond was reasonably capable of improvement for commercial use and therefore navigable under *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940). *Appalachian* contains a refinement of the navigability-in-fact test, providing that "[a] waterway, *otherwise suitable for navigation,* is not barred from that classification merely because artificial aids must make *the highway* suitable for use before commercial navigation may be undertaken." 311 U.S. at 407 (emphasis added). This Court's opinion emphasizes that "there are obvious limits to such improvements" and that determination of reasonableness is one of degree, involving "a balance between cost and need." *Id.* at 407-08. Nothing in *Appalachian,* nor in any other opinion, suggests that a shallow water body with no outlet to navigable waters and for which there is no potential commercial need may be considered navigable because it theoretically could be improved for recreational navigation by the expenditure of millions of dollars.

Mintzer, 245 F. 297 (9th Cir. 1917); and *Chisholm v. Caines,* 67 F. 285, 292 (D.S.C. 1894). Further discussion of the American abandonment of "ebb and flow" is found in Petitioners' initial Brief (Br. for Pet., 34-36, 44-46).

[15] *See* note 5 and accompanying text *supra.*

[16] Independent water bodies have always been examined without regard to the character of adjacent navigable waters. *E.g., United States v. American Cyanamid Co.,* 354 F. Supp. 1202, 1204 (S.D.N.Y. 1973), *aff'd on other grounds,* 480 F.2d 1132 (2d Cir. 1973); *Toledo Liberal Shooting Co. v. Erie Shooting Club,* 90 F. 680, 682 (6th Cir. 1898). The Ninth Circuit accepted, arguendo, this position (Pet. App. 5a n.2)

As the District Court stated, the Government presented no evidence that Kuapa Pond, in its natural condition, was reasonably capable of improvement for commercial needs (Pet. App. 23a-24a).[17] Even now the Government does not seriously contend that any commercial need existed. It argues instead that Kuapa Pond is navigable because Petitioners, as part of a surrounding residential development and at their own extraordinary private expense, have made it so (Br. for U.S., 21). The Government's interpretation would reduce the *Appalachian* test to a tautological absurdity and is worthy of no credit at all.

2. Private Improvement of Kaupa Pond Did Not Subject It to a Public Navigation Servitude.

The Government no longer relies on regulatory jurisdiction to extend the limits of the servitude, conceding that regulatory jurisdiction is broader in scope that the servitude (Br. for U.S., 23 n.18). Instead, the Government now maintains that all waters navigable-in-fact are navigable-in-law even if privately developed out of fast lands wholly with private funds. The simplicity of this argument obscures the fallacies underlying it.

A fundamental flaw in the Government's analysis is its failure to acknowledge that:

> [B]y an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream in its natural con-

[17] This case, contrary to the Government's suggestion, is the same as *Pitship Duck Club v. Sequim,* 315 F. Supp. 309, 310 (W.D. Wash. 1970), and similar cases holding that when improvement of a small water body would be "economically unfeasible," the water body is not navigable.

> dition, not as artificially raised by dams or similar structures; . . . .

United States v. Cress, 243 U.S. 316, 321 (1917).[18]

Even under *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-08 (1940), the capability for improvement is examined upon the basis of the waterway's natural characteristics.[19] For this reason, the navigation servitude opinions of this Court, both early and recent, can speak of navigable waters as "always" having been subject to the servitude. *E.g., United States v. Rands*, 389 U.S. 121, 123 (1967); *Gibson v. United States*, 166 U.S. 269, 276 (1897). The Government, however, would reverse the order of examination. It seeks to determine navigability not on the water's natural condition, but on its present condition, regardless of how that present condition was attained.

The Government's argument also ignores the well-established distinction between public and private waters. The nation has a justifiable interest in preserving its public navigable waters for needs of present and future

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[18] This Court has indeed consistently examined water bodies for navigability upon their "natural and ordinary condition." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698-99 (1899); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-22 (1921); *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926); *United States v. Utah*, 283 U.S. 64, 82-83 (1931); *United States v. Oregon*, 295 U.S. 1, 15 (1935).

[19] In *Appalachian* this Court simply defined "natural and ordinary condition" to refer to "volume of water, the gradients and the regularity of flow" so as not to preclude consideration of reasonable improvements. 311 U.S. at 407. It did not abandon that standard.

commerce. *E.g., Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-24 (1921); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-05 (1940). But, no comparable national interest exists in private nonnavigable waters. *United States v. Cress*, 243 U.S. 316, 320-27 (1917); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69-70 (1913). *See also Kansas v. Colorado*, 206 U.S. 46, 85-94 (1907) (no federal interest in appropriation of flow of nonnavigable stretch of Arkansas River).

The Government's position is inherently contradictory. While disclaiming any intent to extend the reach of the navigation servitude, it asks this Court to apply the servitude to Kuapa Pond, which has always been private, which was nonnavigable-in-fact in its natural condition, and which has never been subject to a public navigation servitude.

In an attempt to avoid this contradiction, the Government insists that Petitioners have "dedicated" Kuapa Pond to public use by "reshaping" adjacent navigable waters when Kuapa Pond was developed into a recreational marina. This argument passes neither factual nor legal muster.

First, Petitioners did not reshape any navigable waters. The boundary of adjacent navigable Maunalua Bay remains intact at the seaward edge of the barrier beach formation, exactly as it has for centuries past. There is no evidence nor any contention that Petitioners' activities in Kuapa Pond have had any material effect on Maunalua Bay or the Pacific Ocean.

Second, nothing in the record suggests that Petitioners dedicated Kuapa Pond to the public. Dedication "must

rest on the clear assent of the owner." *Irwin v. Dixion*, 50 U.S. (9 How.) 10, 30-31 (1850). Here, Petitioners and their predecessors have consistently and steadfastly excluded the public (App. 29-30; Pet. App. 16a-17a).

Moreover, the two lines of cases upon which the Government relies for its dedication argument (Br. for U.S., 35-36) actually support Petitioners' position.

One line stems from *Munn v. Illinois*, 94 U.S. (4 Otto) 113 (1876), which involves regulation only of business activities affected with a public interest. While in *Munn* this Court held that rates for storage of grain could be regulated, it did not hold that the grain elevator had been dedicated to *free* public use. Neither *Munn* nor any of its progeny holds or suggests that the Government may go beyond regulation and appropriate a business enterprise to free public use.

The other line, highlighted by *Marsh v. Alabama*, 326 U.S. 501 (1946), serves the Government no better. *Marsh* involved a "company town," "accessible to and freely used by the public in general" (*Id.* at 503). The Court held that since the town was operated as a public municipality, its owner had no right to restrict public exercise of fundamental liberties of press and religion. In the instant case, however, Kuapa Pond has not been opened to the public by its owners, and no question is presented as to exercise of constitutional rights by those persons authorized to make use of it. Further, the shopping center cases cited by the Government establish that *Marsh* has now been confined to its facts, that public access need not be afforded to areas not ordinarily open to the public, and

that even areas open to the public are not thereby dedicated to unrestricted public use.[20]

The Government's argument, reduced to its essence, is that merely by connecting Kuapa Pond with Maunalua Bay, Petitioners have dedicated it to free and unrestricted public use. The fact of connection, however, does not evidence dedication. No serious contention could be made that a private property owner dedicated his land to free public use by creating access to an adjacent public roadway, or by constructing a gateway to an adjacent public park. No more serious a contention can be made here.

Additional points raised by the Government are readily refutable. The several navigation statutes cited do not determine navigability; they merely define rights dependent upon its existence.[21] The argument that the public will not be able to distinguish between artificial and natural waterways has no substance. Kuapa Pond is a distinct inland water body, well-posted and secured. The ancient barrier beach remains intact. A low highway bridge spans

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[20] *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972). *See also Hudgens v. NLRB*, 424 U.S. 507, 512-21 (1976).

In *Logan Valley Plaza*, this Court noted that access to property "not ordinarily open to the public" may be denied altogether. 391 U.S. at 320. In *Lloyd Corporation*, this Court limited *Logan Valley Plaza*, and rejected the *Marsh* dedication argument as "attenuated" as applied to that case. 407 U.S. at 569. *Hudgens*, which the Government fails to cite, goes even further, greatly limiting and perhaps overruling *Logan Valley Plaza*. Thus, these cases do not support compelled public access to Kuapa Pond. They in fact negate the Government's contention that Petitioners have dedicated Kuapa Pond to public use.

[21] 33 U.S.C. § 1 (Secretary of the Army may restrict public use of "the navigable waters of the United States"); 33 U.S.C. § 565 (private persons may "improve any navigable river, or any part thereof" on approval of plans by the Secretary of the Army and Chief of Engineers of the Army); 33 U.S.C. §§ 21-59(k) (Congressional enactments withdrawing certain navigable waters from public use).

the narrow entrance channel. The public has encountered no difficulty discerning the boundary in the past and will encounter none in the future.

Ultimately, the Government asks this Court to sustain an unprecedented and unjustified extension of the navigation servitude to private waters never within its scope, simply because the Government believes that extraordinary private efforts have made them desirable for public use.[22] Such an inequitous doctrine could be applied any time private efforts made private waters, or fast lands for that matter, susceptible to public recreation. A servitude born out of a salutary national need to preserve public highways of water commerce would be transformed into an unprincipled device for the uncompensated appropriation of private waters and become an abuse of national power wholly beyond its object and needs, *See Veazie v. Moor,* 55 U.S. (14 How.) 568, 575 (1852); *United States v. Cress,* 243 U.S. 316, 319-27 (1917); and 36 OP. U.S. ATT'Y GEN. 203, 213-15 (1930).[23]

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[22] Petitioners have no quarrel with the Government's position that *public* waters privately-improved must *remain public* under 33 U.S.C. § 565. They rightfully point out, however, that it is one thing for the public to guard against private appropriation of public waters and quite another for the public to claim a servitude in private waters privately-improved. The statute indeed makes no claim to private waters and by this omission itself suggests Congressional recognition of Petitioners', not the Government's, position.

[23] The Government dismisses *Veazie* as a case involving improvement of a wholly internal river without direct connection to the sea (Br. for U.S., 25-26 n.22). But the purpose and effect of the improvement was to connect the Penobscot's upper stretches with the sea, by canal and rail (55 U.S. at 571-72). The reason of the Court's ruling there applies with equal logic to Kuapa Pond, which is also an internal water body connected to navigable waters solely by private enterprise. *See* 55 U.S. at 575.

The Government also makes light of the 1930 Attorney General Opinion on the Illinois State Waterway system as

II.

The Imposition of a Public Navigation Servitude Upon Kuapa Pond Constitutes a Taking of Private Property For Public Use Without Just Compensation

In arguing that it has "taken" no private property, the Government persistently asserts that Petitioners had nothing to be taken and that it has taken nothing from them. It disregards the fifth amendment limitation and thereby suggests that the servitude may be exercised in a constitutional vacuum. The servitude, however, is unquestionably limited by the fifth amendment, and private property rights of Petitioners will in fact have been "taken" by imposition of a servitude upon Kuapa Pond.

A. The Navigation Servitude Is Limited By The Fifth Amendment.

The fifth amendment directly proscribes federal taking of "private property . . . for public use, without just compensation." [24] No express immunity is accorded the navigation servitude and decisions of this Court establish that none is to be implied.

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involving "entirely artificial" portions of a canal and suggests that the same opinion recognizes a complete federal right to appropriate without payment privately-improved nonnavigable waterways (Br. for U.S., 38 n.29). It is wrong on both points. The appropriation language of the opinion was restricted to improved *navigable* streams (36 OP. U.S. ATT'Y GEN. at 213, 214). And no basis exists for a distinction between fast lands and *nonnavigable* waters, each of which has been held private by this Court, an oversight likely attributable to the Government's failure to cite or discuss *United States v. Cress* in its Brief.

[24] U.S. CONST., amend. V.

The navigation servitude is part of the broader congressional power over commerce which is no more absolute or unfettered than other legislative powers. As the Court held in *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 336 (1893):

> Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation. . . .

See also United States v. Cress, 243 U.S. 316, 326-27 (1917); *Scranton v. Wheeler,* 179 U.S. 141, 153 (1900).

B. The Imposition Of A Navigation Servitude Upon Kuapa Pond Is A Taking of Private Property.

The Government's argument that it is not taking any private property of Petitioners—just preventing obstruction of lawful public navigation—is pure legal sleight of hand. Imposition of a servitude does take private property. "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago, Rock Island & Pacific Railway Co. v. United States,* 284 U.S. 80, 96 (1931). *Accord, United States v. Dickinson,* 331 U.S. 745, 748 (1947); *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799, 808 (1950).[25]

The confiscation in this case is manifest. Imposition of the servitude will transform private property into public. Petitioners will be entirely deprived of the fruits of their

[25] It makes no difference whether the servitude is imposed by judicial declaration rather than legislative enactment. *See Hughes v. Washington,* 389 U.S. 290, 294-98 (1967) (Stewart, J., concurring).

substantial investment without any recompense.[26] And to compound the injury, the Government expects Petitioners to continue to maintain these improvements (App. 26).[27] However strongly the Government may desire free public use of Kuapa Pond, it may not constitutionally extend the servitude beyond its natural scope, save by condemnation and payment of just compensation. *United States v. Cress,* 243 U.S. 316, 321, 326-27 (1917); *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799, 808 (1950). *See also Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893).[28]

[26] Petitioners had expended $8,981,005 by time of trial in development of Kuapa Pond (Defendants' Exhibit 31).

[27] Maintenance has been supported by fees paid by marina lot lessees and boat owners of $72.00 per year (App. 25-26).

[28] The Government's distinction of *Monongahela Navigation Co.* as resting upon estoppel is not well-taken in the circumstances of this case. That distinction has been applied in cases in which private parties have sought to prevent government activities in navigable waters inimical to their own private interests. It has no application in a case like the present where the Government seeks to take over private improvements and put them to public use. *See Louisville Bridge Co. v. United States,* 242 U.S. 409, 421-23 (1917). Moreover, the Monongahela River was conceded by all to be a navigable stream. Even if conduct akin to estoppel might be necessary for compensation for improvements in public waters, still none should logically be required as a predicate for compensation for improvements in private waters such as Kuapa Pond. In any event, the Government itself was well-advised of the extensive improvements to Kuapa Pond, but never required permits for work in the pond itself, as opposed to work in adjacent navigable Maunalua Bay (App. 56-60, 66-67); its conduct was as inviting as a practical matter as the specific legislative invitation involved in *Monongahela Navigation Co.*

C. The Equitable Principle Underlying The Fifth Amendment Protection Requires That The Public Bear The Burdens Of Public Benefits.

This Court has always been mindful that "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Government's insistence upon free public access to Kuapa Pond ignores this principle.

Uncompensated appropriation of private fast lands for a public park would never be tolerated by this Court. Decisions have consistently required the public, not private citizens, to bear the financial burden of public recreational facilities. No valid reason exists why any different rule should apply with respect to private waters desired for a public water playground.

III.

Extraordinary Private Loss and No Public Gain Will Result From Application of a Public Navigation Servitude To Privately-Improved Private Waters

Extraordinary private loss will inevitably be suffered by imposition of a public navigation servitude upon privately-improved private waters. The principle espoused by the Government will extend to innumerable small water bodies heretofore maintained as the private property of their owners. Owners of existing improvements will be directly deprived of their investment, and owners of other waters will incur significant depreciation in the value of their property. The owners' ability to protect their property by private regulation will be supplanted and no governmental substitute can reasonably be expected to fill this void. Further noncompensable losses, ranging from destruction of property by public users, to increased deterioration of facilities by overuse, to major long-range environmental problems may be anticipated.

No significant public gain counterbalances this great private loss. No public project is proposed. The public interest in preserving adjacent public waters is already amply protected by regulation. The public has no reasonable expectation of use of such private waters, and free public access cannot justify itself as its own end. Any apparent public gain is illusory. The consequence of affirmance of the Government's position will be forebearance from future improvement of private waters and abandonment of presently existing improvements. Private owners cannot be expected to bear the burden of improving and maintaining private waters for public benefit. Private initiative will be stifled. No legitimate federal interest or policy will be served by extension of the navigation servitude to privately-improved private waters. The only effect will be appropriation of these private waters without payment of one cent of compensation. This blatant imposition of public burdens upon private shoulders should not be tolerated by this Court.

CONCLUSION

The judgment of the Court of Appeals reversing the District Court's denial of an injunction mandating public access to Kuapa Pond should be reversed.

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